## BANK BUMIPUTRA MALAYSIA BHD. & ANOR. v. LORRAIN ESME OSMAN & ORS.

[O.C.J. (Zakaria Yatim J.) September 4, 1986]

[Kuala Lumpur – Civil Suit No. C438 of 1985]

*Company Law – Directors – Liabilities of – Breach of fiduciary duties of directors of company – Loss and damage suffered by company – Claim by company for loss against directors – Companies Act, 1965, s. 132(3).*

*Conflict of Laws – Judgment obtained in Hong Kong against borrower of loan – No satisfaction – Lender and its parent company now claim against directors of lender and parent company – Breach of fiduciary duties – Whether Hong Kong law or Malaysian law applicable – Whether plaintiffs can maintain present action in Malaysia – Courts of Judicature Act, 1964, s. 23(1) – Civil Law Act, 1956, ss. 4(3) & 10(1)(a).*

The first plaintiff is a bank incorporated in Malaysia. The second plaintiff (BMF) is a company incorporated in Hong Kong and is a wholly-owned subsidiary of the Bank. BMF is resident outside the Schedule Territories within the meaning of the Exchange Control Act 1953.

The second defendant, Dato Mohd. Hashim Shamsudin (Hashim), was at the material times a director of the Bank and BMF and was thus in a fiduciary relationship with the Bank and BMF, owing them fiduciary duties. The first defendant (Lorrain) was the Chairman of the BMF Board, with the third defendant, Dr. Rais Saniman (Rais), as alternate director. The fourth defendant, Ibrahim Jaafar (Ibrahim), was the General Manager of BMF. The plaintiffs averred that the management of BMF was in the complete control of the four defendants at all material times. The defendants knew or ought to have known that by the end of October, 1982, the Carrian group of companies was experiencing grave liquidity problems. On November 22, 1982, the Board of Directors of the Bank at a meeting attended by Lorrain and Hashim resolved that a Supervisory Committee be appointed to oversee the lending activities of BMF, with express instruction that no further loan applications were to be approved by BMF without the consent of the Supervisory Committee, of which Hashim and Rais were appointed members. Ibrahim knew at the material time of the appointment of this Committee and its terms of reference.

On January 5, 1983, the Supervisory Committee rejected the application of Carrian Nominee Ltd. (CNL) for a loan of US$40 million. The plaintiffs averred that by a telex message on February 4, 1983, George Tan informed Ibrahim that Hashim had told George Tan that funds relating to the US$40 million loan had been made available to the Bank for payment out by BMF in Hong Kong and requested its release. On or about February 4, 1983, and before the execution of any loan documentation, the defendants, jointly and/or severally, caused BMF to release US$38.5 million belonging to the Bank and/or BMF to the Bank of Communications, Hong Kong (BOC), as BMF's agent for payment on to CNL or its agent. Similarly, a further sum of US$1.5 million was released. BMF issued writs against CNL and George Tan to recover the sum of US$40 million but with no chance of recovery, CNL being insolvent. Consequently, the Bank and BMF have suffered loss or damage in the sum of US$40 million and interest thereon. This the plaintiffs claim was the result of the breach of the fiduciary duties of the defendants to the Bank and BMF. Alternatively, the defendants made false representations that the loan was made to BOC, and not to CNL.

Hashim made an application to the court, which ordered the following preliminary issues be decided first:

"(a) whether the law applicable to the substantive matters in issue in these proceedings is the laws of Hong Kong or the laws of Malaysia or both?

(b) whether, under the relevant law so found to be applicable,

(i) Bank Bumiputra Malaysia Berhad, by virtue of its holding the majority of the shares in Bumiputra Malaysia Finance Ltd., a Company incorporated in Hong Kong, can maintain an action for alleged wrong done or for alleged damage caused to the property of Bumiputra Malaysia Finance Ltd.? and

(ii) by reason of the matters set out in paragraph 33A of the Amended Defence of the 2nd Defendant, can the Plaintiffs maintain the present action?"

**Held**: (1) the law applicable to the substantive matters in issue in these proceedings is the law of Malaysia;

(2) (i) the Bank, by virtue of its holding the majority shares in BMF cannot maintain an action against Hashim for alleged wrong done or for alleged damage caused to the property of BMF. This is the position in Malaysia. It is also the position in Hong Kong. The question is irrelevant and meaningless. The Bank is not suing Hashim on the basis that it holds all the shares in the BMF; (ii) the plaintiffs can maintain the present action notwithstanding the matters raised in paragraph 33A of the amended statement of defence of Hashim.

[*Editorial Note:* The 2nd defendant appealed to the Supreme Court (S.C.C.A. No. 404 of 1986). His appeal has since been withdrawn.]

*Cases referred to:*

(1) *Chaplin* v. *Boys* [1971] A.C. 356.
(2) *Coupland* v. *Arabian Gulf Petroleum Co.* [1983] 2 All E.R. 434; [1983] 3 All E.R. 226. 229.
(3) *Trendtex Trading Corporation & Anor.* v. *Credit Suisse* [1982] A.C. 679.
(4) *Nouvau Mont Dor (M) Sdn. Bhd.* v. *Faber Development Sdn. Bhd.* [1984] 2 M.L.J. 268, 269.
(5) *Holt* v. *Heatherfield Trust Ltd. & Anor.* [1942] 1 All E.R. 404.
(6) *Van Lynn Developments Ltd.* v. *Pelias Construction Co. Ltd.* [1969] 1 Q.B. 607.
(7) *Amalgamated General Finance Co. Ltd.* v. *Golding & Co. Ltd.* [1964] 2 Lloyd's Rep. 163.
(8) *Compania Colombiana De Seguros* v. *Pacific Steam Navigation Co.* [1965] 1 Q.B. 101.
(9) *Dearle* v. *Hall* (1828) 38 E.R. 475.

(10) *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* [1905] A.C. 454.
(11) *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1887) 34 Ch. 128.
(12) *Purnell* v. *Paine* [1918] 2 Ch. 72.
(13) *Walker* v. *The South Eastern Railway Co.* (1870-71) 23 L.T. 14.
(14) *Wah Tat Bank Ltd. & Anor.* v. *Chan Cheng Kum* [1975] A.C. 507, 519.
(15) *Mahesan* v. *Malaysian Government Officers' Co-operative Housing Society Ltd.*; [1978] 1 M.L.J. 149; [1978] 2 All E.R. 405, 410.

CIVIL SUIT.

*T. Thomas* for the plaintiff.

*N. Chandran* (*Ravindran s/o Veerasingam Thurairatnam* with him) for the second defendant.

*Cecil Abraham* (*Miss Grace Yeoh* with him) for the third defendant.

*Cur. Adv. Vult.*

**Zakaria Yatim J.** : On July 30, 1985, upon the application of the second defendant and after hearing counsel for the second defendant and counsel for the plaintiffs, I ordered that the following preliminary issues be decided by the Court before hearing all other questions or issues in the present action. The preliminary issues are as follows:

(a) whether the law applicable to the substantive matters in issue in these proceedings is the laws of Hong Kong or the laws of Malaysia or both?

(b) whether, under the relevant law so found to be applicable,

(i) Bank Bumiputra Malaysia Berhad, by virtue of its holding the majority of the shares in Bumiputra Malaysia Finance Ltd. a company incorporated in Hong Kong can maintain an action for alleged wrong done or for alleged damage caused to the property of Bumiputra Malaysia Finance Ltd.? and

(ii) by reason of the matters set out in paragraph 33A of the Amended Defence of the 2nd defendant, can the plaintiffs maintain the present action?

Before considering these issues it is necessary to state briefly the statement of claim.

The first plaintiff (the Bank) is a company incorporated under the laws of Malaysia and carries on the business of banking. The second plaintiff (BMF) is a company incorporated under the laws of Hong Kong. BMF is resident outside the Schedule Territories within the meaning of the Exchange Control Act 1953 and has its registered office at 18/F, Admiralty Centre, Tower One, 18 Harcourt Road, Hong Kong. BMF is a wholly-owned subsidiary of the Bank.

In paragraph 4 of the statement of claim, the plaintiffs aver that the second defendant (Hashim) was between July 8, 1977 and October 31, 1983, the Executive Director and a member of the Board of Directors of the Bank. During the said period Hashim held the position of director of BMF as a nominee of the Bank with the express obligation to represent the Bank's interests on the Board of Directors of BMF. By reason of his position as Executive Director of the Bank and Director of BMF, Hashim was at all material times in a fiduciary relationship with the Bank and BMF. As a result of such relationship Hashim owed fiduciary duties to the Bank and BMF. In paragraph 6.5, the plaintiffs aver that at all material times the Board of Directors of BMF comprised of Hashim and the first defendant (Lorrain), with the third defendant, (Rais) as alternate director to them. Accordingly the management of the BMF was in the complete control of the four defendants at all material times. In paragraph 8, the plaintiffs aver that by the end of October 1982, it was public knowledge that the Carrian group was experiencing grave liquidity problems which in fact the defendants knew or ought to have known. The plaintiffs contend that the defendants and each of them acquired such knowledge, *inter alia*, through their attendance at a meeting of the Board of Directors of BMF held in Kuala Lumpur on October 29, 1982 when the said matter was discussed. In paragraph 9, the plaintiffs state that the Board of Directors of the Bank, at a meeting in Kuala Lumpur on November 22, 1982, and which meeting was attended by Lorrain and Hashim, resolved the appointment by the Bank of a Supervisory Committee consisting of five persons to oversee the lending activities of BMF with express instruction that no further loan applications were to be approved by BMF without the consent of the Supervisory Committee. Hashim and Rais were appointed members of the Supervisory Committee. The fourth defendant (Ibrahim) was aware, soon after November 22, 1982 of the appointment of the Supervisory Committee and its terms of reference.

In paragraph 10 of the statement of claim, the

plaintiffs aver that on December 29, 1982, Hashim caused BMF to send a telex message to Hashim requesting the Bank to consider approving a loan of US$40 million to Carrian Nominee Limited (CNL), a member of the Carrian group, by way of financial assistance to the group in overcoming its liquidity problem. On or about January 3, 1983 CNL's loan application was submitted by the defendants to the Supervisory Committee for consideration. The plaintiffs further aver that at a meeting on January 5, 1983 in Kuala Lumpur and attended by Hashim and Rais as members and Lorrain as observer, it was unanimously decided by the Supervisory Committee to reject CNL's application for the US$40 million loan. The meeting took place approximately between 11.30 am and 12.45 pm. By about 1.30 pm the same day Ibrahim and George Tan who were then in Hong Kong, were informed of the rejection by the Supervisory Committee of the said application. The plaintiffs also aver that by a telex message on February 4, 1983, George Tan informed Ibrahim that Hashim had told George Tan that funds relating to the US$40 million loan had been made available to the Bank for payment out by BMF in Hong Kong and requested for its release. The said telex message was copied to Lorrain. On or about February 4, 1983 and before the execution of any loan documentation the defendants, acting whether jointly and/or severally, caused BMF to release US$38.5 million belonging to the Bank and/or BMF to the Bank of Communications, Hong Kong (BOC) as BMF's agent for payment on to CNL or its agents. On or about February 9, 1983 BMF, BOC and CNL executed the relevant agency and loan agreements relating to the release of the US$38.5 million to CNL. It was an express term of the said agreements that BMF would not hold BOC liable in the event of any default by CNL. At the same time George Tan executed a guarantee in respect of the said transaction. On or about February 9, 1983 BOC released the said sum of US$38.5 million to Spartans Investments Ltd. as agent for CNL. By a telex message on or about February 9, 1983, George Tan requested Ibrahim to cause the release by BMF of the balance of US$1.5 million to make up US$40 million. The said telex message was copied to Lorrain. On or about February 9, 1983 and before the execution of any loan documentation the defendants, whether acting jointly and/or severally, caused BMF to release the said sum of US$1.5 million which belonged to the Bank and/or BMF to BOC as BMF's agent for payment on to CNL or its agents, which BOC did at about the same time. On or about February 10, 1983 the defendants, whether acting jointly and/or severally, informed the Bank that BMF had lent to BOC the said sum of US$38.5 million. The Bank, however, was not informed at the time that BOC was obliged to pay out, and did pay out, the said sum of US$38.5 million to CNL and hence was merely acting as BMF's agent in the transaction and relying on the said information the books of the Bank were recorded to show the same as a money market loan to BOC and not the real borrower, CNL. At a a meeting of the Supervisory Committee on October 10, 1983 in Kuala Lumpur and attended by Hashim and Lorrain, the Supervisory Committee discovered that the purported loan by BMF of US$40 million to BOC was in fact a loan made to CNL. The Bank then took the necessary steps to correct the entries in its books to show that the real borrower of the US$40 million loan was CNL. As a result of CNL and George Tan's refusal and/or neglect to repay the said sum of US$40 million together with interest, BMF issued writs against them in the Supreme Court of Hong Kong for the recovery of the same. In view of the large number of creditors having claims against CNL and George Tan, and CNL, being insolvent BMF has little or no chance of successfully recovering the said sum of US$40 million together with interest, or at all from either or both of them. In any event as a matter of law the Bank cannot sue either CNL or George Tan for the recovery of the same. In consequence the Bank and BMF have suffered loss or damage in the sum of US$40 million and interest thereon.

In paragraph 11 of the statement of claim, the plaintiffs state that by the matters pleaded in paragraph 10, the Bank and BMF contend that the defendants and each of them acted wrongfully by reason of their having complete control of BMF, in directing and/or causing BMF to lend to CNL US$40 million and by reason of their knowledge that such action would be contrary to the interests and wishes of, and in breach of the instructions given by, the Bank. Accordingly the defendants were in breach of their fiduciary duties to the Bank and BMF, as a result of which the plaintiffs have suffered loss and damages. In paragraph 12, the plaintiffs aver that alternatively, in reliance upon the defendants' representation to the Bank that the borrower of the US$40 million loan was BOC, the Bank made available to BMF the said sum for the express purpose that BMF lend the same, to BOC. In fact the defendants' said representation was false and was made fraudulently in that the loan was actually made to CNL and not to BOC, or the said representation was made recklessly, the defendants not caring whether it was true of false. By reason of the said misrepresentation the plaintiffs

have suffered loss and damages. In paragraph 13, the plaintiffs further aver, alternatively between January 5, 1983 and February 11, 1983, the defendants and each of them wrongfully and with intent to injure the plaintiffs conspired and agreed together to effect a scheme whereby CNL would be able to receive (and did in fact receive) the said sum of US$40 million from the plaintiffs to the detriment of the plaintiffs and with the intent, purpose and result did effect such scheme whereby the plaintiffs sustained injury by suffering loss and damage the extent of US$40 million. In paragraph 15, the plaintiffs aver that on June 8, 1983, the defendants and each of them caused BMF to release a sum of US$40 million to Nanyang Commercial Bank (Nominees) Limited of Hong Kong (NCB) for payment on to Fitarget Investment Limited (Fitarget), a Carrian Company. Payment of the said sum was made to Fitarget on or about July 9, 1983. On or about June 15, 1983, the defendants whether acting jointly and/or severally, informed the Bank that BMF had lent the said sum of US$4.5 million to NCB as a normal money market loan. The true nature of the loan and the identity of the real borrower was not disclosed to the Bank. On or about December 7, 1983, the Bank took the necessary steps to correct the entries in its books to show that the real borrower of the loans totalling US$7.5 million was Fitarget. On April 7, 1983, Ibrahim had already signed an agency agreement for and on behalf of BMF with NCB whereby BMF agreed to lend Fitarget a loan of US$3 million through the agency of NCB. Both Fitarget and George Tan refused and/or neglected to repay the said sum of US$7.5 million together with interest. BMF has little or no chance of successfully recovering the said sum or at all from either or both of them on the ground that Fitarget is insolvent and there is a large number of creditors having claims against George Tan. In any event as a matter of law the Bank cannot sue either Fitarget or George Tan for the recovery of the loan. The Bank and BMF have therefore suffered loss or damage in the sum of US$7.5 million and interest thereon.

In paragraph 17 of the statement of claim, the plaintiffs aver that the Bank and BMF contend that the defendants, and each of them, were in breach of their fiduciary duties owed to the Bank and BMF. The particulars of breach of fiduciary duty are:

(1) failing to comply with the instructions of the Bank that all loan applications submitted to BMF after November 22, 1982 should only be considered by the Supervisory Committee;

(2) failing to submit NCB's alleged applications for the US$3.5 million and US$4 million loans to the Supervisory Committee for approval either prior to the disbursement of funds or at all; and

(3) failing to inform the Supervisory Committee that the real borrower was Fitarget, a Carrian Company and not NCB.

In paragraph 18, the plaintiffs aver that in reliance upon the defendants' representation to the Bank that the borrower of the US$7.5 million loans was NCB, the Bank made available to BMF the said sum for the express purpose that BMF lend the money to NCB. In fact the defendants' said representation was false and was made fraudulently in that, the loan was actually made to Fitarget and not the NCB, or the said representation was made recklessly, the defendants' not caring whether it was true or false.

In paragraph 20, the plaintiffs aver that the defendants and each of them were in breach of their duties as directors/officers of the Bank and BMF and accordingly are liable under section 132(3) of the Companies Act, 1965 and/or under common law for all damages suffered by the Bank and BMF as a result of such breach. The plaintiffs further aver in paragraph 21 that the defendants and each of them by their own neglect, want of skill or misconduct in the management of the Bank and BMF caused the Bank and BMF to suffer loss or damage in the sums of US$40 million and US$7.5 million. Accordingly the defendants, and each of them, are obliged under section 165 of the Contracts Act, 1950 and/or under common law to compensate to the plaintiffs, by way of damages, such loss or damage.

Before I proceed to consider the questions or issues as specified in the Order of this Court dated July 30, 1985, it should be mentioned here that Hashim, the second defendant, does not question the jurisdiction of this Court to try the action filed by the plaintiffs in the present case. Mr. N. Chandran, counsel for Hashim, in his submission told the Court that his client did not question the jurisdiction of this Court. I think Mr. Chandran was right in not raising the question of jurisdiction. Section 23(1) of the Courts of Judicature Act, 1964 clearly states that "...the High Court shall have jurisdiction to try all civil proceedings where ...(b) the defendant or one of several defendants resides or has his place of business ... within the local jurisdiction of the Court..." In the writ of

summons, Hashim's address is given as Number 3, Lorong Duta Empat, Taman Duta, Kuala Lumpur. In his affidavit affirmed in London on October 3, 1985, he gave the same address at Taman Duta. In paragraph 2 of that affidavit he said he left for England in November 1984. In a report on company search made in Hong Kong on April 23, 1985, Hashim was a director of a company known as Silver Present Limited as at September 6, 1981. His address stated in the Report of the company search is his Kuala Lumpur address at Taman Duta. On October 25, 1984, the Ahmad Noordin Committee wrote to him at the same address. The letter reached him as indicated by his reply on November 2, 1984 using the same address at Taman Duta. From the evidence I have just stated I have no hesitation in concluding that at the material time Hashim was residing in Kuala Lumpur within the local jurisdiction of this Court. There is also evidence that Hashim's "place of business' at the material time was Bank Bumiputra Malaysia Berhad, Jalan Melaka, Kuala Lumpur. Paragraph 4.1 of the statement of claim avers that Hashim was between July 8, 1977 and October 31, 1983 the Executive Director and a member of the Board of Directors of the Bank. In paragraph 6 of his amended statement of defence, Hashim admits that during the period in question, he was the Executive Director and a member of the Board of the Bank. On March 16, 1981, Ibrahim Jaafar, the General Manager of BMF wrote a letter to Hashim in his capacity as Executive Director, Bank Bumiputra Malaysia Berhad, Jalan Melaka, Kuala Lumpur. On March 23, 1981, Ibrahim Jaafar again wrote to Hashim in his same capacity as Executive Director of the Bank. On November 22, 1981 Hashim attended the meeting of the Board of Directors of the Bank, at the Bank's board room, Jalan Melaka, Kuala Lumpur. In a letter dated October 12, 1982 addressed to the Executive Chairman of the Bank, Hashim tendered his resignation as Executive Director of the Bank. The documents referred to above are exhibited to the affidavit of Johari bin Zakariah affirmed on August 9, 1985. It is evident, from the documents that Hashim had his place of business at Bank Bumiputra Malaysia Berhad, Jalan Melaka, Kuala Lumpur at the material time.

I shall now turn to the first question or issue to be considered by the Court, namely, whether the law applicable to the substantive matters in issue in these proceedings is the law of Hong Kong or the law of Malaysia or both.

Mr. Chandran contended that the law applicable to the substantive matters or issue in these proceedings is the law of Hong Kong to the exclusion of all other laws. According to him, there is only one exception, that is, the provisions under the English Law Ordinance (Cap. 88, Revised Edition 1971) of Hong Kong. Mr. Chandran filed an affidavit affirmed by him on August 29, 1985, and attached to the affidavit is an opinion of Mr. Denis Chang, Q.C., of Hong Kong pertaining to the issues before the Court. Mr. Chandran's contention that the applicable laws are the laws of Hong Kong to the exclusion of all the other laws was based on the following grounds:- (1) BMF is a company incorporated under the laws of Hong Kong; (2) BMF has at all material times been resident and continues to be resident in Hong Kong; (3) BMF has at all material times carried on business in Hong Kong; and (4) matters complained of in the plaintiffs' statement of claim are directly connected to the BMF business operation in Hong Kong. Mr. Chandran submitted that BMF is a Hong Kong entity and governed by the laws of Hong Kong namely, the Companies Ordinance (Cap. 32 – Revised 1975).

In considering what law is applicable in the present case the Court has to be guided by the principles laid down by the House of Lords in *Chaplin* v. *Boys.*[1] In that case, the respondent sustained serious injuries in a road accident in Malta caused by the admitted negligence of the appellant. Both parties were normally resident in England but stationed in Malta at the relevant date as members of the British Armed Forces there. The respondent brought an action in England and the only issue before the Court was whether the damages were to be assessed according to the law of Malta or the law of England. The House of Lords held that the respondent, bringing his action in England, could recover damages assessed according to the law of England.

In his judgment in that case, Lord Guest at page 381 said that "to justify an action in England for a tort committed abroad the conduct must be actionable by English law and by the laws of the country in which the conduct occurred, the *lex loci delicti.*" He then found that these conditions were satisfied as the negligent driving of the appellent was actionable both by the law of England and by the law of Malta. Having made this finding he proceeded to examine what law was to be applied to the ascertainment of damages and decided that the applicable law as English law. Lord Wilberforce also applied the same test when he said at page 348 that the wrong was actionable

in England and in Malta under the laws prevailing in each of those countries namely, the *lex fori* and the *lex loci delicti.* Lord Hodson also relied on the same test and then made the following conclusion at page 380:

"I would accordingly, in agreement with the Master of the Rolls, treat the law of England as applicable since even though the occurrence took place in Malta this was overshadowed by the identity and circumstances of the parties, British subjects temporarily serving in Malta."

The decision in *Chaplin's* case was followed by the English Court of Appeal in *Coupland* v. *Arabian Gulf Petroleum Co.*[2] In that case the plaintiff was living and domiciled in Scotland. The defendants were a nationalised oil company in Libya which was registered in England under Part X of the English Companies Act, 1948. In January, 1978 the plaintiff was employed by the defendants to work for them in Libya. The contract of employment was duly made in London. The plaintiff worked in Libya until December 1978 when he had a serious accident at work. The plaintiff began proceedings in England for damages for personal injuries. On the trial of a preliminary issue regarding the proper law of the claim, the judge held that the claim was actionable both in England and in Libya. The judge further held that the proper law of the claim in tort was English law. The appeal against the decision of the learned judge was dismissed by the Court of Appeal. Robert Goff L.J., in his judgment at page 229 said:

"...we are left with the simple situation that the judge has held, applying the principles in *Chaplin* v. *Boys*, that the claim in tort must proceed on the basis that the claim must be actionable by the lex fori and also actionable by the lex loci delicti. He has held, having heard the evidence, that it is actionable under the lex loci deliciti, and so that requirement has been fulfilled. It follows, in my judgment, that for the claim in tort, Libyan law falls out of the picture as being irrelevant, and so for that purpose the trial can proceed on the basis of the ordinary principles of common law negligence."

In the instant case, the plaintiffs' claim against Hashim and the other defendants is based on at least three causes of action. The first cause of action is that Hashim and the other defendants were in breach of their fiduciary duties to the Bank and BMF as a result of which the plaintiffs suffered loss and damage. The second cause of action is fraudulent misrepresentation by Hashim and the other defendants. The third cause of action is for damages suffered by the plaintiffs as a result of the alleged breach of duties as directors/officers by Hashim and the other defendants and therefore recoverable by the plaintiffs under common law.

According to Denis Chang's opinion, in Hong Kong a company can maintain an action against its director for breach of fiduciary duty. In his opinion he also states that under Hong Kong law, damage is the gist of the cause of action in tort just as it is under the common law. According to him this is so whether one is dealing with the tort of fraud, conspiracy to injure, negligence or some other tortious breach of duty.

From Denis Chang's opinion, which I think states the correct position of the law in Hong Kong, it is clear that the present claim before this Court is also actionable in the Court in Hong Kong.

Having decided that the plaintiffs' claim in the present case is also actionable in Hong Kong, the next question for determination is what is the law applicable in the present case?

In order to answer the question the Court has to examine what is the situation in the present case? The Bank was incorporated under the laws of Malaysia and carries on business in Malaysia. Hashim was, at all material times, an executive director and a member of the board of directors of the Bank. He is a Malaysian and until he left for England in November 1984 he was residing in Kuala Lumpur. The BMF was incorporated under the laws of Hong Kong and is resident in Hong Kong. It is a wholly owned subsidiary of the Bank. Although BMF was incorporated in Hong Kong, its operation was controlled by Hashim and its other directors from Kuala Lumpur. The third defendant, (Rais), who was one of the directors of BMF, was an employee of the Bank and occupied the position of the Senior General Manager of the International Banking Division of the Bank. Rais was an alternate director to the first defendant (Lorrain) and Hashim on the Board of the BMF as well as its advisor. Lorrain was a director of the Bank and Chairman of the Board of Directors of the BMF. From the documents exhibited to the affidavit of Johari bin Haji Zakariah affirmed on August 9, 1985, it is evident that Lorrain was, at the material times, resident in Kuala Lumpur and his place of business was Rooms 14.06-14.10, Wisma Stephens, Jalan Raja Chulan, Kuala Lumpur. Several meetings of the BMF Board of Directors were held at this address when they considered the loans to the Carrian group. It should be added here that from the documentary evidence the facts complained of occurred not only in Hong Kong but also in Malaysia.

In view of the circumstances of the present

case I come to the conclusion that the law applicable to the substantive matters in issue in the present proceedings is the law of Malaysia.

I shall now turn to the second question or issue to be determined by the Court. This question is divided into two parts. The first part of the question is whether, under the relevant law so found to be applicable, that is Malaysian Law, the Bank by virtue of its holding the majority of the shares in BMF, can maintain an action for alleged wrong done or for alleged damage caused to the property of BMF? I must confess that I am unable to understand the purpose of the first part of the question. It is not disputed that only BMF can sue for any wrong done or caused to its property. This is the position in Hong Kong as well as the position in Malaysia. Mr. T. Thomas, counsel for the plaintiffs submitted that the Bank, as plaintiff number one is suing Hashim for breach of obligations and duties owed to the Bank. He added that the Bank was not suing Hashim for wrongs allegedly committed by Hashim to BMF. I agree with the submission made by Mr. Thomas. From the facts of the case Hashim was the director of BMF at the material times. Hashim can be sued by BMF for any wrong done by him or any breach of duties to BMF in his capacity as director of BMF. Similarly Hashim was, at the material time, the executive director and a member of the Board of Directors of the Bank. Hashim can be sued by the Bank for any wrong done by him to the Bank or any breach of duties owed by him to the Bank in that capacity. The situation as stated in the first part of the question does not reflect the true situation in the present case. The Bank, in the instant case is not suing Hashim for alleged wrong done or alleged damage caused to BMF. Therefore my answer to the first part of the question in the form it is stated, is that the Bank cannot maintain an action against Hashim. Mr. Thomas had told the Court that he had no objection to the question. In my view he had rightly told the court that the "question is meaningless."

The other part of the second question is whether, under the relevant law so found, that is Malaysian law, by reason of the matters set out in paragraph 33A of the amended statement of defence filed by Hashim, the plaintiffs can maintain the present action? In order to consider this question, it is necessary to examine the matters set out in paragraph 33A of Hashim's amended defence. In that paragraph, Hashim avers that even if he was liable the plaintiffs "have with full knowledge and consent adopted, affirmed, ratified and validated the alleged loans complained of in the statement of claim as having been made or granted without or in excess of authority or in breach of fiduciary duty." The particulars alleged by Hashim in that paragraph are as follows: (1) The plaintiffs caused or procured the resignation of Lorrain and Hashim from BMF's board of directors and Rais from BMF's employment on account of and for the alleged breaches of duty on October 31, 1983. (2) On December 31, 1983, BMF, for full value and benefit assigned to the Bank several debts including those complained of in the claim representing that the said debts were good, valid and created properly and with due authority. (3) BMF sued and obtained judgment in Hong Kong against one of the debtors, Carrian Nominees Ltd. in suit number 15133 of 1983 on July 17, 1984 for the recovery as a debt of US$40 million covered by the said assignment. (4) The two assignments are governed by the laws of Hong Kong and by the said laws operated to effect a satisfaction of the debt to BMF and the second assignment operated as a satisfaction to the Bank and BMF. (5) The plaintiffs instituted compulsory winding-up proceedings against Perak Pioneer Ltd. and Plessey Investments Ltd. on the basis and strength of the assignment for recovery of the other debts covered by the said assignments. (6) On September 17, 1984, the Bank, whilst the winding-up proceedings were still pending, assigned for full value and consideration all the alleged debts to Petroleum Nasional Berhad (Petronas), who then acted on the further assignment and successfully applied to substitute itself as the petitioner in place of the Bank. Hashim states further in sub-paragraph 2 of 33A that for the reasons stated in sub-paragraph one, the plaintiffs have retrospectively validated and recognised the validity of the said loans. Hashim also avers that the plaintiffs have waived, exonerated or excused the alleged breaches of duty complained of against Hashim as such an allegation would be inconsistent, and cannot stand together with the recognition of the validity of the debts. Hashim avers further that the plaintiffs, having received full benefit by the said assignment, would have suffered no loss. Hashim also avers that at all material times, the plaintiffs had no cause of action against him.

I shall deal with the question of assignment raised in paragraph 33A of the amended statement of defence. There are two assignments in the present case. The first assignment was executed on December 31, 1983 between BMF and the Bank. The preamble of the deed of assignment states that BMF is the principal creditor of various companies

incorporated and having their respective registered office in Hong Kong in the principal sums and interest accrued up to end of December 31, 1983. Clause 1 of the deed of assignment states that in consideration of the Bank paying to BMF a sum of US$887,520,384.55 by way of telegraphic transfer to BMF's account at a bank in New York, USA such sum to be applied towards repaying the Asian Currency Unit (ACU) borrowings as and when each such borrowing matured in 1984, BMF assigned to the Bank, the benefit of all rights and interests in the debts and security interests and other choses in action together with all other rights and interests held by BMF in relation to the debts owing to BMF. Clause 3 provides that BMF agreed to act under the directions of the Bank to enforce, call in, prove in bankruptcy or liquidation, and in its own name, until further directions from the Bank to take such legal proceedings as were necessary to recover the debts assigned for the benefit of the Bank. BMF also agreed to act under the directions of the Bank to exercise and enforce on behalf and for the benefit of the Bank all rights under any mortgages, charges, debentures, guarantees and all other security and other interests assigned to the Bank and "to take such legal proceedings as are necessary for the exercise and/or enforcement and/or protection of such rights." Under the assignment, the Bank appointed BMF to be its true and lawful attorney to do and execute on behalf and for the benefit of the Bank all or any of the acts deeds and things as specified in schedule 6. Schedule 6, *inter alia*, states:

"To ask demand sue for recover and receive of and from all and every person or corporation or firm or company whatsoever all sums of money in respect of the debts herein assigned which now are or which at any time or times hereafter shall or may become due or owing or payable to or recoverable by the Assignee by virtue of this Deed of Assignment and on receipt thereof to make sign execute and give good and sufficient receipts releases acquitances or other discharges for the same (if it is so required) and also to sign seal execute make and deliver all proper and sufficient conveyances releases and other assurances of the properties which have been mortgaged as security therefor (if it is so required) as the Assignor shall think fit."

The second deed of assignment was executed on December 17, 1984 between the Bank and Petroleum Nasional Berhad (Petronas). The preamble of the second assignment refers to the debts owing to BMF by companies incorporated in Hong Kong and to the first assignment. Clause 1 of the second assignment states that in consideration of Petronas paying to the Bank a sum of MR1,255,237,000.00 being the total amount due and payable towards the full satisfaction of the second assignment as well as the first assignment, the Bank assigned to Petronas the benefit of all rights and interests in the debts and security interests and other choses in action together with all other rights and interests held by the Bank in relation to the debts, including without limitation the right to receive interest in the said debts. Clause 2 states, *inter alia*, that the Bank shall act under the directions of Petronas to enforce, call in, prove in bankruptcy or liquidation and in its own name, until further directions from Petronas, to take such legal proceedings as are necessary to recover the debts, including interest assigned for the benefit of Petronas. Clause 4 states that the Bank was appointed by Petronas to be its true and lawful attorney to do and execute on behalf and for the benefit of Petronas all or any of the acts, deeds and things set out in Schedule 6 of the first assignment.

Mr. Chandran submitted that by virtue of the first assignment, BMF had consented, adopted, affirmed, ratified and validated the alleged loans complained of in the statement of claim. According to him, having so assigned for value, BMF could no longer be in a position to claim that it had suffered any damages. He also said that in view of both the assignments, BMF and the Bank must be deemed to have retrospectively validated and recognized the validity of the said loans. He added that both the Bank and BMF had not suffered any loss in view of the assignments and accordingly there could be no action for breach of fiduciary duty against Hashim and the other defendants. He then asked the Court to dismiss the claim against Hashim.

Mr. Thomas, on the other hand, argued that the plaintiffs' causes of action were personal claims involving personal obligations of the four defendants to the Bank and BMF and because they were personal causes of action they could not be the subject matter of the assignments. He added that the plaintiffs' claim in the present action does not come within the scope of the assignments. In any event, he said, the express notice in writing to be given under section 4(3) of the Civil Law Act, 1956 had not been given to any of the four defendants. Mr. Thomas further contended that both assignments contain express terms empowering BMF and the Bank to sue on behalf of their respective assignees.

In my opinion, under both assignments the plaintiffs have not waived, exonerated or excused Hashim from alleged breaches of duty complained

of against him in the statement of claim. As Mr. Thomas has rightly told the Court the plaintiffs' causes of action were personal claims involving personal obligations of Hashim to the Bank and BMF. In *Trendtex Trading Corporation and Anor.* v. *Credit Suisse,*[3] Lord Roskill, in his judgment at page 702 said, "...causes of action which were essentially personal in their character, such as claims for defamation or personal injury, were incapable of assignment..." In my view this passage states the correct position of the law.

I should add here that the plaintiffs' claim in the present case does not come within the scope of the two assignments. Looking at both the deeds of assignment, it is evident that what was agreed in each of the assignments were choses in action and rights in interest. In both assignments there is no reference to the four defendants.

Mr. Thomas referred to section 4(3) of the Civil Law Act, and submitted that no express notice in writing had been given to the defendants. Section 4(3) states:

"Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

The wordings of this subsection are similar to section 25(6) of the English Judicature Act 1873 which had since been replaced by section 136 of the Law of Real Property Act 1925. See *Nouvau Mont Dor (M) Sdn. Bhd.* v. *Faber Development Sdn. Bhd.*[4] The English decisions are therefore relevant in construing section 4(3) of the Civil Law Act. Before examining the English authorities the Court should ascertain whether any notice in writing had been given to the defendants. In his affidavit affirmed on July 18, 1985, Johari bin Zakariah, the legal officer of the Bank confirmed "that neither Petronas, the Bank nor BMF have given written notice of the said assignment to the 4 defendants...as required by section 4(3) of the Civil Law Act, 1956. . . " Hashim has not denied Johari's affidavit. The Court finds that there is no evidence that notice had been given by Petronas, the Bank and BMF to Hashim.

It is essential under section 4(3) of the Civil Law Act that express notice in writing of the assignment must be given to Hashim. The assignment operates from the date of the notice, that is, date on which it is received by or on behalf of Hashim. See *Halsbury's Laws of England*, 4th Edn. v. 6, page 14. The legal assignment is only complete on the date the notice is received by the debtor. *Holt* v. *Heatherfield Trust Ltd. & Anor.*[5] The purpose of the notice is to inform the debtor to whom he has to pay the debt. *Van Lynn Development Ltd.* v. *Pelias Construction Co. Ltd.*[6] Since no notice had been given to Hashim by either Petronas, the Bank or BMF, the Bank and BMF are entitled to file the present action against Hashim. Petronas can only sue Hashim if the notice had been served on Hashim and until such notice is given, Petronas has no right to sue. See *Amalgamated General Insurance Co. Ltd.* v. *Golding & Co. Ltd.*[7] and *Compania Colombiana De Seguros* v. *Pacific Steam Navigation Co.*[8] The position with regard to notice in equitable assignment is the same as that in legal assignment. *Halsbury's Laws of England,* 4th Ed. v.6, pages 18 & 26. See also *Dearle* v. *Hall*[9]; *William Brandt's Sons & Co.*[10] and *Gorringe* v. *Irwell India Rubber and Gutta Percha Works.*[11]

I should add here that in both the deeds of assignment, there are express terms which authorise the Bank and BMF to sue Hashim and the other defendants. Clause 2(a) of the second assignment states that the Bank shall act under the directions of Petronas and shall take such legal proceedings to recover the debts assigned to Petronas. A similar provision is found in clause 3(a) of the first assignment.

I shall next deal with the question of ratification referred to in paragraph 33A of the amended statement of defence. Mr. Chandran submitted that the first assignment amounted to a ratification of the alleged loans complained of in the statement of claim. He said that the provisions of the first assignment were deemed to have ratified all that had been alleged to have been done by Hashim and accordingly Hashim had nothing to answer to the plaintiffs' claim. According to Mr. Chandran BMF had sued and obtained judgment in Hong Kong against one of the debtors, CNL in Suit No. 15133

of 1983 for the recovery as a debt of US$40 million.

In the plaintiffs' reply to the amended defence of the second defendant, they deny that Hashim is entitled to rely on the defences of acquiescence and ratification on the ground that the plaintiffs had no choice but were instead compelled to take all necessary actions after discovering the acts of the defendants in causing the release of the US$47.5 million loans to the Carrian group. The plaintiffs also aver that they did not have the requisite full knowledge of all the essential facts.

According to *Halsbury's Laws of England*, 4th Ed. v.1, page 457, "Ratification must be evidenced either by clear adoptive acts, or by acquiescence equivalent thereto. The act or acts of adoption or acquiescence must be accompanied by full knowledge of all the essential facts..." The principal cannot be said to adopt an act when he cannot help himself. See the statement of Bankes L.J. in *Purnell* v. *Paine*[12] at page 78. There are two essential requirements to constitute ratification. In *Walker* v. *The South-Eastern Railway Co.*,[13] Smith J. stated the two requirements at page 18:

"But two points arise on the question of ratification: first, there would be no ratification unless the original act was in some sense done on behalf and for the benefit of the company; and, secondly, the mere fact that the Attorney of the Company appeared before the magistrates to prosecute, without evidence that he knew of the circumstances of the imprisonment, was not alone sufficient evidence of ratification."

In the instant case was Hashim acting on behalf and for the benefit of BMF and the Bank when he took part in the decision to release the US$47 million to the Carrian group? The answer is certainly "no." Instead he was acting to the detriment of BMF and the Bank as a result of which both BMF and the Bank suffered loss and damage.

When BMF sued CNL and obtained judgment in Hong Kong, BMF was compelled to take such step. There was certainly no option open to BMF but to sue CNL to recover the debt. Furthermore, BMF and the Bank did not have full knowledge of the facts at that time. I find that the filing of the suit in Hong Kong does not amount to ratification or even election.

Mr. Thomas submitted that although BMF had sued CNL in Hong Kong, BMF and the Bank can still sue the four defendants in Malaysia. I agree with his submission. Section 10(1) (a) of the Civil Law Act clearly states:

"(1) Where damage is suffered by any person as a result of a tort...

(a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable in respect of the same damage."

This provision enables the plaintiffs to sue the defendants in the present action.

There is, however, one limitation. The plaintiffs must not recover more than the amount claimed or twice the amount claimed. In *Wah Tat Bank Ltd. & Anor.* v. *Chan Cheng Kum*[14] the Privy Council said:

"The amount of damages awarded for a tort is normally awarded as compensation for the amount of damage which that tort has caused the plaintiff. Each joint tortfeasor, irrespective of the degree of his blame vis-a-vis other joint tortfeasors, is liable to the plaintiff for the whole of the damage which the tort has caused him. The plaintiff is therefore entitled to judgment against each of the joint tortfeasors for the whole of the damage which he has suffered but he cannot recover in the aggregate more than the sum at which that damage is assessed. The present is such a case."

*Wah Tat's* case is an appeal from Singapore. But the position is the same in Malaysia. In *Mahesan* v. *Malaysian Government Officers' Co-operative Housing Society Ltd.*,[15] the Privy Council said,

"The authorities to this effect are discussed at length in the speeches in *United Australia Ltd.* v. *Barclays Bank Ltd.*,[2] a case in which the House of Lords confirmed the principles; that where the same facts gave rise in law to two causes of action against a single defendant, one (formerly lying in assumpsit) for money had and received and the other for damages for tort, the plaintiff must elect between the remedies. It held, however, that such election was not irrevocable until judgment was recovered on one cause of action or the other. The House of Lords also held that where the same facts gave rise in law to a cause of action against one defendant for money had and received and to a separate cause of action for damages in tort against another defendant, judgment recovered against the first defendant did not prevent the plaintiff from suing the other defendant in a separate action: but that to the extent that the judgment was actually satisfied this constituted satisfaction pro tanto of the claim for damages in the cause of action against the second defendant."

In the instant case George Tan and the four defendants are joint tortfeasors. When CNL's application for the US$40 million loan was rejected by the Supervisory Committee on January 5, 1983 between 11.30 am and 12.45 pm. George Tan, who was in Hong Kong, knew of the rejection by the Committee at 1.30 pm. the same day. Notwithstanding the rejection by the Supervisory

Committee, George Tan sent telex messages requesting Ibrahim to cause the release by BMF of the US$40 million to CNL. The money was subsequently released to CNL. The plaintiffs are also alleging conspiracy between the defendants and George Tan. The conspiracy was instigated by George Tan.

Although BMF had obtained judgment against CNL in Hong Kong, it has not recovered a single cent. What was obtained was a "paper judgment." CNL could not pay a single cent. In the circumstances, the plaintiffs are entitled to sue the four defendants in the present action.

Hashim's defence alleges that the plaintiffs, at all material times, have no cause of action against him. From the statement of claim, it is clear that the plaintiffs have at least three causes of action against the defendants. I have already mentioned these causes of action, namely, the defendants were in breach of their fiduciary duties to the Bank and BMF; fraudulent misrepresentation and breach of duties as directors/officers.

Mr. Chandran, in his submission, referred to paragraph 20 of the statement of claim. The paragraph states that:

"...the defendants and each of them were in breach of their duties as directors/officers of the Bank and BMF and accordingly are liable under section 132(3) of the Companies Act 1965 and/or under common law for all damages suffered by the Bank and BMF as a result of such breach."

According to Mr. Chandran, section 132(3) of the Companies Act has no application to the present case because the proper law governing the matters before this Court is the law of Hong Kong and there is no provision in Hong Kong equivalent to or similar in nature to our section 132(3). He argued that the plaintiffs' claim against the second defendant based on that section is not maintainable. In support of his argument he relied on the opinion of Denis Chang, who states that Hong Kong does not have the equivalent of section 132(3) of the Companies Act in force in Malaysia. Section 132 states:

"(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

(2) An officer or agent of a company shall not make use of any information acquired by virtue of his position as an officer or agent of the company to gain directly or indirectly an improper advantage for himself or for any other person or to cause detriment to the company.

(3) An officer or agent who commits a breach of this section shall be –

(a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach; and

(b) guilty of an offence against this Act.

Penalty: Imprisonment for one year or two thousand five hundred dollars.

.....

(5) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company."

I am unable to accept Mr. Chandran's argument since I have already made a finding that the law applicable to the substantive matters in issue in this case is the law of Malaysia.

For the reasons stated above my answers to the preliminary questions or issues raised by Hashim are as follows:

(a) the law applicable to the substantive matters in issue in these proceedings is the law of Malaysia.

(b) (i) The Bank, by virtue of its holding the majority shares in BMF cannot maintain an action against Hashim for alleged wrong done or for alleged damage caused to the property of BMF. This is the position in Malaysia. It is also the position in Hong Kong. The question is irrelevant and meaningless. The Bank is not suing Hashim on the basis that it holds all the shares in the BMF.

(ii) The plaintiffs can maintain the present action notwithstanding the matters raised in paragraph 33A of the amended statement of defence of Hashim.

I order that Hashim pay the costs of the trial of these preliminary questions to the plaintiffs in any event.

*Order accordingly.*

Solicitors: *Skrine & Co.; Adrian Sundra & Low; Shearn Delamore & Co.*